IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 351

R. V. ARCHAWSKI, et al.,

Petitioners,

v.

BASIL HANIOTI, etc.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

HARRY D. GRAHAM,
Counsel for Petitioners,
76 Beaver Street,
New York 5, N. Y.

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Opinion of United States Court of Appeals. Second Circuit. 1

(Record pages 1399 to 1402)

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 319 October Term, 1954

Argued April 20 and 21, 1955 Decided June 3, 1955

Docket No. 23566

R. V. Archawski, et al.,
Libellants-Appellees, 2

against

Bash. Haxioti, etc., et al.,
Respondents,

Bash. Haxioti, etc.,
Respondent-Appellant.

Before: Frank, Medina and Hincks, *Circuit Judges.*

Defendant appeals from a judgment and decree of the United States District Court for the Southern District of New York, which contains a direction that a writ of attachment against the person of defendant shall issue for its 3
enforcement. In admiralty. Lawrence E. Walsh, Judge. Opinion below reported 129 F. Supp. 410. Reversed and remanded.

Harry D. Graham, New York City, New York, for libellants-appellees.

Leonard Aitschul, New York City, New York, (Samuel Bader, New York City, New York, of Counsel), for respondent-appellant.

MEDINA, *Circuit Judge*:

The record before us presents a maze of complications, procedural and otherwise. Of the various points raised, however, it is necessary to discuss but one, as we have concluded that there was no jurisdiction in admiralty and, there being no other alleged basis of federal competence, the case must be dismissed.

The libel, by several hundred prospective passengers on the "City of Athens", a vessel of Honduran registry, names as respondent Basil Hanioti, and he is sued "individually, and doing business as Sociedad Naviera Transatlantica, 5 S.A., Compania De Vapores, Mediterranea, American Mediterranean Steamship Line, Ltd., American Mediterranean S/S Agency, Inc., and Basile Shipping Company, Inc.," it being alleged that the concerns whose names are thus set forth are "ostensible firm names," in fact mere "alter egos" of Hanioti, who is accordingly described as the owner of and in control of the "City of Athens." The use of these alter egos or "mere shams" is alleged to be part of "a designed plan for the purpose of shielding himself from possible liability for the fraudulent acts hereinafter stated and by virtue of which the respective libellants have each been damaged."

It is then alleged that between November 9, 1946, and 6 July 23, 1947, Hanioti and his alter egos "then being hopelessly insolvent, unbeknown to any of the libellants," advertised the "City of Athens" as a common carrier of passengers for hire, that libellants paid certain sums as passage money for a voyage scheduled for July 15, 1947, and that both the voyage and the vessel were abandoned by Hanioti. The balance of the libel is devoted to an enumeration of various fraudulent practices said to have been resorted to by Hanioti, such as secreting himself and his

assets, maintaining "a secret residence in New York the location of which, after due diligence, cannot be found," and otherwise defrauding libellants of the moneys they had paid. The libel avers that the moneys were "collected to the respondent's account" and that they "were wrongfully and deliberately applied to his own use and benefit in reckless disregard of his obligations to refund the same."

While a contract for the transportation of passengers by sea is a maritime contract, and a suit for its enforcement would plainly be within the admiralty jurisdiction of the District Court, this libel sets forth no such claim, but rather is in the nature of the old common law *indebitatus assumpsit*, for money had and received, based upon the wrongful withholding of moneys by respondent, on the theory that in equity and good conscience he is under a duty to pay them over to libellants. *Silva v. Bankers Commercial Corporation*, 163 F. 2d 602 (C.C.A. 2, 1947); *United Transp. & L. Co. v. New York & Baltimore T. Line*, 185 Fed. 386 (C.C.A. 2, 1911). If the libel is viewed as stating some sort of a claim based upon tortious conduct in the nature of fraud, as seems to have been the intent of the pleader, the case against admiralty jurisdiction is even clearer.

Reversed and remanded to the District Court for dismissal for lack of admiralty jurisdiction.

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Respondent's Notice of Appeal From Final Decree.

(Record page 392)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that the respondent Basil Hanioti hereby appeals to the Court of Appeals for the Second Circuit from the final decree docketed as Judgment #59801 on January 11, 1955, in the above entitled proceeding and
11 that this appeal is from each and every part thereof.

Dated: New York, March 24, 1955.

Yours &c.,

LEONARD ALTSCHUL /s
Leonard Altschul,
Attorney for Respondent Basil Hanioti.
Office & P. O. Address,
No. 384 East 149th Street,
Borough of Bronx,
City of New York.

To:

12 HARRY D. GRAHAM, Esq.,
Attorney for Libellants,
No. 76 Beaver Street,
Borough of Manhattan,
City of New York.

CLERK OF UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK.

Opinion/Order of United States District Court.

(Record pages 317 to 324)

#24

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

APPEARANCES:

HARRY D. GRAHAM, Esq., Proctor for Libellants, 76 Beaver Street, New York 5, New York. 14

LEONARD ALTSCHUL, Esq. (ARCHIBALD PALMER, Esq., of Counsel), Proctor for Respondent, 384 East 149th Street, Bronx, New York.

OPINION

WALSH, *D.J.*

After a decree had been entered in favor of libellants respondent moved to vacate the decree as one entered upon a default and to vacate the order for body execution entered in connection with that decree. Both motions are denied.

The trial of this action was duly scheduled for November 23, 1954. On that date the attorneys of record for the respondent Hanioti appeared before the court, stating they had been unable to get in touch with their client, had no idea where he could be reached, and did not know when or if he would return. They conceded that he was already in default in appearing for oral examination although an order directing his appearance had been made from the bench by Judge Sugarman, and it is uncontradicted that he was in default on three other occasions in connection 15

with this matter. They were unprepared to offer any defense. The attorney for the libellants submitted his proof and a decree was granted in their favor. On December 6th the decree was formalized and signed by the Court embodying the judgment and authorizing the issuance of execution against the person of Hanioti.

Thereafter, on December 7th, respondent Hanioti first manifested an interest in these proceedings. By a show cause order he moved to vacate the decree and to enjoin its enforcement by body execution. His explanation for his failure to cooperate with his attorneys on November 23rd was that he had had a falling out with them as long
17 ago as December, 1953, that he had discharged them, that they had refused to represent him, that they refused to turn over papers in their possession pertaining to his various law suits to his present attorney (who was not of record in this case), and refused to give him any information as to the date of trial in the present action.

However, his own affidavit belies these excuses as well as his claim made in court by one of his present attorneys, that he had been under the impression that the present action was dismissed by Judge Ryan in 1952. His affidavit asserts that on November 9th his attorneys of record notified his business associate, through whom he customarily received communications, one Stathos, that the trial date was approaching and that they would not represent
18 him. This message was relayed to him. Even if it is true, as he claims, that at that time they told Stathos the trial date was the first week in December, it does not excuse his failure to ascertain the exact and correct date independently, considering the alleged nature of his relations with these attorneys, nor his failure to take those steps which any reasonable litigant, with bona fide intentions of defending a suit for over $130,000, would take under similar circumstances in the belief that the date of trial

was less than one month distant. There is no basis for believing that any other attorney represented him at the date of trial. He did not ask his present attorney, Mr. Altschul, to represent him until after its conclusion. He took no steps to notify the court of any substitution of attorneys until even later.

These facts, his testimony under oath before me, and the record of his testimony before Judge Ryan, convince me that the default, if it may so be called, was wilful and that the respondent is an unbelievable scoundrel, indifferent to money judgments against him because he believes himself judgment proof under the ordinary methods of execution. The motion to vacate the decree is accordingly 20
denied.

The only question remaining is whether body execution is appropriate in this case. Libellants' action is based on the breach of a contract of affreightment. In 1947 they paid for passage from New York to various European ports or back aboard a vessel known as City of Athens. The voyages, scheduled for July 15, 1947 and thereafter, never took place, because, prior to that date, the vessel was libelled by various creditors and sold. The passage money was never refunded although there is no doubt that under the terms of the contract itself and under the controlling decisions, the passengers were entitled to recover in admiralty from the ship owner. *The Moses Taylor*, 71 U. S. 411, 427; *The Aberfoyle*, Fed. Cas. No. 16, aff'd. Fed. Cas. 21
No. 17; *Foster* v. *Compagnie Francaise de Nav. A. Vapeur*, E. D. N. Y., 237 F. 858; *Benedict on Admiralty* (6th Ed.), Vol. I, § 61.

The nominal owner of the ship was a Panamanian corporation, Sociedad Naviera Transatlantica, S.A. This vessel was substantially its only asset. *City of Athens*, 1949 A. M. C. 572, 576. The corporation kept "some sort of books".

It kept no separate bank account. It, as well as other ship-owning corporations set up and managed by Hanioti along the same lines, were, by his own admission, "mere paper companies". Their assets were freely intermingled because it was "immaterial" to Hanioti in what name checks were made out or received. They were all one group, under the control of Hanioti.

It is an elementary proposition of law that where the corporate form is used merely as an alter ego, or business conduit of a person, it may be disregarded to prevent fraud. *Fletcher Cyc. Corps.* (Perm. Ed.), Vol. 1, §§ 41, 44 and 46 and cases there cited; *A. B. Dick* v. *Marr*, S. D.
23 N. Y., 48 F. Supp. 775, 776, aff'd. 2 Cir. 155 F. 2d 923; *In Re V. Loewer's Cambrinus Brewery Co.*, S. D. N. Y., 74 F. Supp. 909, 913, aff'd. 2 Cir. 167 F. 2d 318; *Hollander* v. *Henry*, 2 Cir. 186 F. 2d 582; *African Metals Corp.* v. *Bullowa*, 288 N. Y. 78, 85, 41 N. E. 2d 466; *S. F. S. Realty Co., Inc.* v. *George M. Adrian & Co.*, 285 N. Y. S. 1018, 159 Misc. 26. On the facts in this case it is clear that the libellants were entitled to recover in admiralty from respondent Hanioti personally, as the ship owner, on the maritime contract.

Admiralty Rules 3 and 20 point to State procedures for enforcement of admiralty decrees. New York Civil Practice Act, Sections 764 and 826, provides for execution against the person in certain types of actions. Section 826(9)
24 provides for arrest:

> "In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of fraud in contracting or incurring the liability, or that, since the making of the contract, or in contemplation of making the same, he has removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same

with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action: * * *"

The New York cases hold that a representation of solvency or concealment of insolvency by a purchaser when buying goods on credit, coupled with an intent not to pay for them is fraudulent. It is enough to authorize arrest under this subdivision. *Wright* v. *Brown*, 67 N. Y. 1; *Tannenbaum* v. *Reich*, 2 N. Y. S. 734; Cf. *Norris* v. *Talcott*, 96 N. Y. 100; *Hotchkin* v. *Third Nat. Bk. of Malone*, 127 N. Y. 329, 344; and see *Anonymous*, 67 N. Y. 598. There is no difference between buying goods with the intent not to pay for them and taking unearned moneys with the intent not to perform the services. *The Henry W. Breyer*, 1927 A. M. C. 290, 303; and see *Lehrer* v. *Nusbaum*, 233 N. Y. S. 340, 133 Misc. 710. 26

There is sufficient evidence in the record before the Court to justify the inference not only that respondent was insolvent; knew he was insolvent, but also that he took this money with the intent not to perform.

A. Respondent was insolvent:

In the proceeding in Baltimore creditors' claims of $775,457.82 were allowed. Only $400,000 was realized from the sale of the ship, the corporation's only asset; and less than $401,837.71 was available for distribution. Insolvency may be inferred from the fact that shortly after the purchase judgments were entered against the purchaser grossly in excess of the amount realized from his property. *Tannenbaum* v. *Reich*, 2 N. Y. S. 731. 27

B. Respondent knew he was insolvent:

Hanioti, in the Baltimore proceeding, admitted that prior to the filing of the libel in the Baltimore pro-

ceeding, he knew the corporate owner was in a precarious position and had practically no funds.

C. Respondent intended not to perform:

1. Not only did he accept passage money right up until the libel was filed, but the record shows he continued to receive it even after the filing of the libel and the attachment of the vessel by his creditors.

2. At no time was the vessel supplied or provisioned to make the scheduled July 15th voyage.

29 3. There were no funds in any of Hanioti's various coffers to provide such supplies and provisions. Hanioti's account with the ticket agent was virtually empty. The Court found no assets belonging to the Sociedad except the vessel. *City of Athens,* 1949 A. M. C. 572, 576. According to Hanioti's own testimony before Judge Ryan, referred to by both parties in connection with this motion, the Compania De Vapores, through whose accounts most of the disbursements for the ship owning corporation were made, also "collapsed" along with his other companies in 1947.

These facts are sufficient to satisfy the Court that Hanioti accepted the passage money, most of which was received within a month of the promised voyage, with the knowledge 30 that the vessel could not make the July crossing and with the intention of defrauding the libellants.

The action is on the contract, thus within the admiralty jurisdiction of the Court. The libel alleges fraud in the contracting of the agreement which was broken. This fraud has been established to my satisfaction. Under the New York statutes this is enough to sustain a body execution.

The libellants are also entitled to body execution on the further ground that Hanioti disposed of or removed his property with intent to defraud. By his own admission he had the unqualified power to dispose of the funds paid to his ticket agent by the libellants. In New York, it has been held that such funds, paid for passage on ships for voyages which were not undertaken form constructive trust funds for the benefit of the prospective passengers. *Ieffer* v. *Hanioti*, 92 N. Y. S. 2d 914, 276 App. Div. 78. No satisfactory explanation was ever made as to their whereabouts. Like the District Court for the district of Maryland, I disbelieve his testimony that they had been ultimately paid over to Todd. Even if they were, in view of his financial circumstances, he had no right to use them to pay an old debt unrelated to the voyage in question. His diversion of these moneys to the Vapores account where they were mingled with funds which had been paid to his other companies and out of which they could not be traced, and his failure to keep separate records and accounts for the Sociedad, constituted a disposal with intent to defraud.

Motions to vacate the decree and the order for body execution contained therein are denied. Costs to libellants. It is so ordered.

LAWRENCE E. WALSH,
United States District Judge.

Dated: February 9, 1953.

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Final Decree.

(Record pages 293 and 294)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This cause having duly come on to be heard in regular order on November 23, 1954, upon all prior proceedings, the pleadings and the proofs and having been argued and submitted by Harry D. Graham, Esq., proctor in behalf
35 of libellants, and Frank H. Cooper & Frank Delaney, proctors in behalf of respondent, by Frank H. Cooper, Esq., advocate, the Court, after due deliberation, having found the allegations contained in the libel to be amply supported upon the record and that the passage monies procured from the libellants by the respondent, and those for whom he is responsible, in consideration of contracts for passage upon the steamship "City of Athens" were fraudulently procured; that such passage monies were unearned and, as such, constituted constructive trust funds and, upon abandonment of the vessel and her scheduled voyages for which the libellant/passengers were booked, such passenger monies were refundable to the libellants and though payment thereof by the libellants was duly demanded, the
36 respondent refused to make such repayment and actually had converted said funds to this own use and the use of those for whom he is responsible and the Court, further, having directed a decree to be entered in favor of the libellants with costs, heretofore taxed in the sum of $35.00,

Now, on motion of Harry D. Graham, Esq., proctor for the libellants, it is

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ORDERED, ADJUDGED AND DECREED, that the libellants recover of the respondent, Basil Hanioti, their respective passage monies as scheduled in the libel, aggregating the sum of $130,383.69, and costs as taxed at $35.00, and said respondent, Basil Hanioti, is hereby directed to pay said sum of $130,383.69 and costs in sum of $35.00, making in all the total sum of $130,418.69, with interest thereon at 6% from the 23rd day of July, 1947, until paid, to the libellants through their proctor, Harry D. Graham, Esq., for distribution amongst them together with their costs as taxed;

38.

FURTHER ORDERED, ADJUDGED AND DECREED, that unless this decree be satisfied within ten days from the date of service of a copy hereof, with notice of entry, upon the respondent's proctors herein, or unless execution upon this decree be stayed by an appeal with proper and approved security thereon during said ten-day period, the Clerk of the Court is directed to issue to the United States Marshal a writ of attachment against the person of said Basil Hanioti to compel him to perform and obey this decree.

Dated, New York, N. Y., December 6, 1954.

LAWRENCE E. WALSH,
United States District Judge.

A TRUE COPY

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WILLIAM V. CONNELL, Clerk
By EUGENE LIEBER
Deputy Clerk

(SEAL)

40

Libel.

(Record pages 245 to 250)

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libels and complaints of R. V. Archawski, Mrs. R. Acker, P. Agresti et al. (list of libellants continues), individually and severally,

against

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Basil Hanioti, individually, and doing business as Sociedad Naviera Transatlantica, S. A., Compania de Vapores, Mediterranea, American Mediterranean Steamship Line, Ltd., American Mediterranean S/S Agency, Inc., and Basile Shipping Company, Inc., in causes of contract, civil and maritime, respectfully shows and alleges, upon information and belief:

First: That at all of the times hereinafter mentioned and as set forth in libellants' annexed Exhibit I, the

42 respondent, Basil Hanioti, doing business under his own name and as Sociedad Naviera Transatlantica, S.A., Compania de Vapores Mediterranea, American Mediterranean Steamship Line, Ltd. and American Mediterranean Steamship Agency, Inc., maintained his principal office and place of business at 44 Whitehall St., City of New York, owned and controlled a certain passenger vessel known as the "City of Athens" of Honduran registry

SECOND: That the aforesaid ostensible firmnames, under which the respondent operated, were in fact his alter egos and mere shams created by him and used by him to further a designed plan for the purpose of shielding himself from possible liability for the fraudulent acts hereinafter stated and by virtue of which the respective libellants have each been damaged.

THIRD: Between November 9th, 1946 and July 23rd, 1947, the respondent and his alter egos then being hopelessly insolvent, unbeknown to any of the libellants, advertised and held out the steamer "City of Athens" as a common-carrier of passengers for hire. 44

FOURTH: On the respective dates set forth beside their names in the attached exhibit 1, the libellants paid the respective sums set forth beside their names for passage upon said vessel, as scheduled, commencing with an advertised and scheduled voyage for July 15th, 1947 and thereafter.

FIFTH: On or about the 24th day of July, 1947, through his alter egos, Hanioti, the respondent, notified the passenger-libellants herein of his abandonment of the voyages scheduled and fled the United States to Europe, abandoning the vessel also.

SIXTH: That the aforesaid sums paid by the libellants 45 were collected to the respondent's account and, though unearned passage monies, were wrongfully and deliberately applied to his own use and benefit in reckless disregard of his obligations to refund the same and, though refunds were duly demanded he has refused to pay the same and has secreted himself away and manipulated his assets as hereinafter set forth for the purpose of defrauding the libellants.

SEVENTH: That respondent is now the owner of two vessels known as the "Basile" and the "Carmen", the latter of which is presently in the port of New York and within the jurisdiction of this Court, and said respondent is presently conducting business under the name of "Basile Shipping Company, Inc." although after diligent efforts no office for such ostensible firm, which in fact is his alter ego, can be found.

EIGHTH: That said "Basile Shipping Company, Inc." was created by the respondent for, and as, an attempt to shield himself from liability and satisfaction of any decrees
47 that may be issued against him in connection with his manipulations and operations aforementioned, and is in fact a fraud and a sham and a mere dummy within his control.

NINTH: That in addition to the aforesaid fraudulent acts of the respondent, he committed other transactions, made conveyances, assignments and other manipulations with the intent to deceive and in fraud of the libellants.

TENTH: That during the pendency of process herein, the respondent has, or will have, goods, assets, credits, chattels, effects and monies to his account, or to the account of his alter ego, Basile Shipping Company, Inc., in the hands and control of Sieling & Jarvis of 50 Broadway,
48 Borough of Manhattan.

ELEVENTH: Respondent maintains a secret residence in New York the location of which, after due diligence, cannot be found.

TWELFTH: That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Court.

THIRTEENTH: That the refusal of the respondent, and those for whom he is responsible, to refund or return the respective unearned passage monies paid by the libellants has damaged each of the libellants in the respective sums set forth beside their names in the annexed exhibit No. 1 which is made part of this libel.

WHEREFORE, libellants pray that a citation in due form of law, according to the course of this honorable Court in cases of admiralty and maritime jurisdiction, may issue against the respondent Basil Hanioti and each of the respondents hereinabove named and that he may be required to appear and answer under oath this libel, and all and singular the matters aforesaid and if he cannot be found that the goods, chattels and, if none can be found, that the credits and effects to the respondents or Basile Shipping Company, Inc. account in the hands and custody of Sieling & Jarvis of 50 Broadway, New York City, including respondent's vessel s/s Carmen, may be attached to the sum of $130,632.79, that being the aggregate of the respective libellant's damages, with costs, and that said Sieling & Jarvis may be cited to appear and answer on oath as to the credits and effects in their hands and custody belonging to, and to the account of said Basile Hanioti or Basile Shipping Company, Inc. and that this honorable Court may be pleased to grant its decree or decrees for the respective damages of each of the libellants herein, with costs and such other and further relief as in law and justice they may be entitled to receive.

Sept. 16, 1952.

HARRY D. GRAHAM,
Proctor for Libellants,
76 Beaver Street,
New York 5, N. Y.

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Exhibit I Annexed to Libel.

LIBELLANTS' SCHEDULE

Name	*Ticket No.*	*Fare Paid*	*Itinerary*	*Date Paid*
R. V. Archawski	814, 815, 816, 817 & 818	$3108.00	Mars/NY	6/17/47
Acker, Mrs. R.	460	249.10	Naples/NY	4/27/47
Agresti, P.	861 / 862	616.00	Naples/NY	6/26/47
	Total	$130,383.69		

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et al., (libellants' schedules continue)

(Verification of Libel, Sept. 16, 1952)

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